United States Court of Appeals

for the Second Circuit

REPLY BRIEF

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, : Docket No. 75-1246

-against- :

DONALD EUCKER, :

Defendant-Appellant. :

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SUPPLEMENTAL REPLY BRIEF
FOR DEFENDANT-APPELLANT
DONALD EUCKER

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
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SUPPLEMENTAL REPLY BRIEF FOR
DEFENDANT-APPELLANT DONALD EUCKER

This brief is submitted in reply to the government's supplemental brief.

ARGUMENT

COUNT 9 OF THE INDICTMENT DOES NOT CHARGE AND THE GOVERNMENT CONCEDES THAT EUCKER, IN ENTERING HIS PLEA OF GUILTY, DID NOT ADMIT FACTS WHICH NECESSARILY AMOUNT TO A VIOLATION OF THE STATUTES PROSCRIBING FRAUD OR COMMINGLING OF CUSTOMERS' SECURITIES, AND ACCORDINGLY, EUCKER'S GUILTY PLEA MAY NOT FORM THE BASIS FOR A CONVICTION OF ANY OF THOSE OFFENSES

Eucker's guilty plea to Count 9 of the indictment admitted only those facts alleged in the count, to wit, the hypothecation of fully paid for customer's securities. Those facts as alleged in the indictment and as admitted on the plea do not amount to all the essential elements of any crime.

In its March 8, 1976 opinion, this Court suggested

that five statutes had possible applicability to the facts admitted by Eucker on his plea.* The government now abandons its reliance on three of those statutes--the anti-fraud provisions of the securities laws (15 U.S.C. §§78j[b], 78o[c], and 77q[a])--because "the jurisdictional elements of those provisions had not been alleged in the indictment or admitted by Eucker upon his guilty plea" (government's supplemental brief, p. 6, n**).

This same logic should have compelled the government to abandon its reliance on the two subsections of 15 U.S.C. §78h(c) which prohibit commingling of customer's securities (15 U.S.C. §§78h[c][1], [2]). As pointed out in Eucker's supplemental brief, the hypothecation of fully paid for securities--the facts admitted by Eucker--can be accomplished without necessarily resulting in commingling of securities as pro-

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*Although the indictment language nearly tracks the language of Subsection (3) of 15 U.S.C. §78h(c), the government stated in its original brief to this Court that it never really intended to charge Eucker with violating that subsection. Eucker contended on his appeal that the indictment which presumably charged a Subsection (3) violation was defective because it failed to allege an essential element of that offense, to wit, that the total amount of securities hypothecated exceeded the aggregate indebtedness of all customers on securities carried for their accounts. Apparently in agreement with Eucker's contention, this Court remanded the case to the District Court to enable Eucker to move to withdraw his plea of guilty upon the ground that it was made without knowledge of the possible applicability of five other statutes (15 U.S.C. §§78h[c][1] and [2], 78j[b], 78o[c], and 77q[a]).

hibited by Subsections (1) and (2) by hypothecating only one customer's fully paid for securities to any single lender.

Indeed, the government concedes that "commingling would be avoided under those circumstances * * *" (government's supplemental brief, p. 5).* Although that concession should end the inquiry, the government seeks to have Eucker's conviction affirmed on the theory that "* * * as a practical matter [the hypothecation of fully paid for securities not resulting in commingling] simply does not arise" (id.).

The government's argument is specious. Eucker's guilty plea consisted of his admission that he hypothecated fully paid for securities. Since that admission does not necessarily subsume an admission to the commingling offenses the government cites, Eucker's plea can no more be the basis for a conviction of those offenses than it can for the fraud offenses the government has now abandoned or for that matter any other offense. What custom and practice is in the securities industry and what the government's proof was at the Orvis Brothers trial is totally irrelevant.

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*Given this concession, it follows that Count 9 of the indictment is defective on its face in charging a crime under 15 U.S.C. §78h(c)(1) or (2) because an essential element of those offenses--hypothecation under circumstances permitting commingling--is neither alleged nor necessarily subsumed within the facts which are alleged.

The simple fact is that Eucker's plea did not admit and Count 9 of the indictment did not charge all the elements of any offense. It follows that the judgment of conviction must be reversed and Count 9 dismissed.

CONCLUSION

Eucker's conviction must be reversed and Count 9 of the indictment dismissed.

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Respectfully submitted,

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